U. A. SMALL

IBLA 89-20 Decided March 29, 1989

Appeal from a decision of the Utah State Office, Bureau of Land Management, rejecting mineral patent application U-61236.

Affirmed.

1. Appeals: Generally--Rules of Practice: Appeals: Failure to Appeal

Under 43 CFR 4.410, the timely filing of a notice of appeal is necessary to establish jurisdiction over a matter. Failure to file a timely appeal has the result that a decision becomes final action for the Department, and the Board will not consider the validity of such decisions in a later appeal. The failure to file a timely appeal from decisions declaring mining claims abandoned and void precludes the Board from considering the validity of the claims in an appeal from the rejection of a patent application for those claims.

2. Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim--Mining Claims: Abandonment--Mining Claims: Patent

Unless a final certificate has been issued, an appli-cant for a patent to a mining claim is not excused under 43 CFR 3833.2-4 from the requirement to file annually an affidavit of assessment work or notice of intention to hold the claim with BLM under 43 U.S.C. | 1744 (1982).

3. Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim--Mining Claims: Abandonment--Mining Claims: Patent

The purchase price for lands covered by an application for mineral patent is not properly submitted until after

it is established that no adverse claim or other objection appears. Where the record establishes that there were significant problems with a patent application requiring resolution before purchase money could properly be tendered and final certificate issued, the premature payment and acceptance of mineral patent purchase price neither creates any right to receive certificate of title nor lifts the obligation to comply with the recordation provisions of the Federal Land Policy and Management Act of 1976.

4. Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim--Mining Claims: Abandonment--Mining Claims: Patent

BLM properly rejects a patent application for mining claims which have become invalid because the claimant failed to file a copy of his affidavit of assessment work as required by 43 U.S.C. | 1744 (1982).

APPEARANCES: U. A. Small, pro se.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

U. A. Small has appealed from the September 16, 1988, decision of the Utah State Office, Bureau of Land Management (BLM), rejecting his mineral patent application (U-61236) for the Bumblebee 1 through 19 placer mining claims (UMC 276181 through UMC 276187 and UMC 279175 through UMC 279186). BLM rejected Small's application because his mining claims became abandoned and void by operation of law on account of his failure to timely submit a 1987 affidavit of assessment work. BLM noted in its September 16 decision that it had issued decisions on June 16, 1988, declaring the claims abandoned and void, but that Small filed no appeal from those decisions within the required timeframes.

Small located these mining claims on March 1, 1984, and filed his patent application for them with BLM on November 24, 1986, along with a filing fee. On February 9, 1987, Small tendered $950 to BLM to cover the cost of patenting the 19 claims. On March 16, 1987, BLM notified Small that additional evidence was required for the application. Small filed his response on April 9, 1987. Apart from these filings and a letter from Small inquiring into the status of his application filed on September 28, 1987, the record contains nothing further concerning the claims received in calendar year 1987.

On June 16, 1988, BLM notified Small by two decisions that his mining claims were declared abandoned and void by operation of law because of failure to comply with the recordation provisions of section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. | 1744

(1982). 1/ BLM cited appellant's failure to file evidence of assessment work or a notice of intention to hold the claims prior to December 31, 1987. The decisions provided for a 30-day period in which to submit information showing that the required documents had been timely filed, failing in which, the claims would be declared abandoned and void without further notice. The decision advised Small of his right to appeal to this Board.

On June 22, 1988, despite the recordation problems concerning the claims which placed their validity in doubt, BLM wrote a letter to Small advising him that yet more information was required on his patent application. Small received all three of BLM's decisions on July 5, 1988, that is, two dated June 16, 1988, concerning the failure to comply with FLPMA, and the one dated June 22, 1988, requiring him to file more information in support of his patent application.

Under the terms of BLM's June 16, 1988, decisions concerning the failure to file as required by FLPMA, Small had until August 4, 1988, to file proof with BLM that he had complied with these requirements in calendar year 1987. Small did file documentation on July 11, 1988, but it responded only to BLM's June 22 decision. It contained nothing bearing on the question of his failure to record documents for the claims in calendar year 1987, as required by FLPMA. Following the expiration of the 30-day compliance period on August 4, Small did not file an appeal to this Board.

On September 16, 1988, BLM issued its decision rejecting the mineral patent application, holding that, under 43 CFR 3833.2-4, annual filings must be made under FLPMA until such time as a mineral patent final certificate has been issued. Thus, it held, as no final certificate had ever been issued for these claims, Small was obliged to meet these requirements in 1987, but had failed to do so. Further, BLM noted that no appeal of the voiding of the claims for the failure to meet the FLPMA requirements had been filed, thus rendering this action final. As there were no longer any unpatented mining claims to patent, BLM rejected his mineral patent application. Small appealed.

[1] Small's appeal is from BLM's September 16, 1988, rejection of his mineral patent application. Nevertheless, he raises arguments that are directed to the propriety of BLM's June 16, 1988, decisions declaring the claims abandoned and void. Small filed no appeal from the June 16 decisions. By the time BLM issued its decision dated September 16, 1988, the period for filing an appeal from those decision had expired.

1/ Under section 314 of FLPMA, 43 U.S.C. | 1744 (1982), the owner of an unpatented mining claim is required to file evidence of annual assessment work or a notice of intention to hold the mining claim prior to Dec. 31 of each year. Such filings must be made each calendar year, on or after Jan. 1 and on or before Dec. 30. Failure to file within the prescribed period properly results in the claim being extinguished and therefore abandoned and void. United States v. Locke, 471 U.S. 84 (1985).

Appellant's failure to file a timely appeal from the June 16 decisions precludes our consideration of them. Under 43 CFR 4.410 the timely filing of a notice of appeal is necessary to establish this Board's jurisdiction over a matter. Failure to file a timely appeal has the result that a decision becomes final action for the Department. This Board will not consider the validity of such decisions in a later appeal. See, e.g., City of Klawock, 94 IBLA 107 (1986); Inexco Oil Co., 93 IBLA 351 (1986). Thus, appellant's failure to file a timely appeal from the decisions declaring his mining claims abandoned and void precludes us from considering the validity of the claims in this appeal.

[2] Notwithstanding the above, were we to address Small's arguments, we would conclude that BLM properly declared these claims abandoned and void. Small asserts that he was not required to file a copy of the assessment work or notice of intention to hold the claims in 1987 because a patent application had been filed for them. It is true that, in addition to receiving his patent application, BLM accepted and has retained the purchase money submitted by Small for his application. 2/

However, the statutory provision, 43 U.S.C. | 1744 (1982), exempts no unpatented claim from the filing requirement. Departmental regulation 43 CFR 3833.2-4 provides just one exception: that evidence of annual assessment work or a notice of intention to hold a mining claim need not be filed for an unpatented claim "for which an application for a mineral patent which complies with 43 CFR Part 3860 has been filed and the final certificate has been issued." (Emphasis added.) Thus, unless a final certificate has been issued, an applicant for a patent to a mining claim is not excused, under 43 CFR 3833.2-4, from the requirement to file annually an affidavit of assessment work or notice of intention to hold the claim with BLM under 43 U.S.C. | 1744 (1982).

There is no regulatory provision allowing the filing of a patent application and/or tendering of purchase money to constitute filing under FLPMA. We note that BLM once proposed to amend 43 CFR 3833.2-4 by deleting any references to the issuance of a final certificate so that the filing of a patent application itself would satisfy the recordation requirements of 43 U.S.C. | 1744 (1982). 47 FR 19298, 19300 (May 4, 1982). It expressly rejected this proposal, however, and made no change to the text of the regulation, thereby retaining the reference to the issuance of the final certificate. 3/

This reference is fatal to Small's contention here. Further, the patent application is not cognizable as a recordation filing under

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2/ Small states that he had given BLM a check for $25 at the time he filed his application and another check for $950 to cover the entire cost for patenting the 19 claims. Appellant's receipt and the accounting advice in the case file show that the purchase price was received on Feb. 9, 1987.

3/ The Department rejected this proposal after receiving comments which noted that a mining claimant who has filed for patent is still required to comply with annual assessment requirements under 30 U.S.C. | 28 (1982) and

FLPMA, as it was not an "exact legible reproduction or duplicate * * * which has been * * * filed for record * * * in the local jurisdiction of the State." 43 CFR 3833.2-3(b)(1); see Donald L. Howard, 104 IBLA 374, 376 (1988).

[3] Small recognizes that no final certificate was issued, but asserts that, because he had submitted his application and paid the purchase money, a final certificate should have been issued. He notes that, after he filed his application, "a period of over 9 months elapsed with no word from" BLM. He asserts that, "had the certificate been issued to me at that time, the assessment work for the year of 1987 would not have been necessary." Small also contends that it was improper to reject his patent application after the purchase money has been accepted.

While Small is correct that a final certificate is to be issued upon BLM's receipt of the purchase money (see BLM Manual 3862.5.51 and 3863.1.11), the purchase price is not properly submitted until after it is established that no adverse claim or other objection appears. See 30 U.S.C. || 29 and 35 (1982); 43 CFR 3862.4-6 and 3863.1(a). The record shows that there were significant problems with Small's application requiring resolution before the purchase money could properly be tendered and final certificate issued. Although Small evidently published notice of his patent application in a local newspaper, the description of the claims in the notice does not appear to satisfy regulatory requirements. See 43 CFR 3862.4-2 and 3863.1(a).

Moreover, in January 1987, BLM received a letter from Eldon W. Schmutz protesting the granting of appellant's application. This protest raised substantial questions as to the validity of the claims. The existence of this unresolved protest, by itself, precluded acceptance of the purchase money and issuance of a final certificate. Finally, BLM's requests for additional information show that Small's application did not satisfy all of the regulatory requirements. It is clear in view of the presence of these problems that, although Small may have submitted the purchase money for claims, he did so prematurely. 4/

The submission of purchase money and acceptance by BLM can create no rights to a final certificate not authorized by the regulations. 43 CFR

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fn. 3 (continued)
State mining laws. Based on these comments and an analysis of the requirements of 30 U.S.C. | 28 (1982), the Department decided to retain the language in the existing regulation because it offered the claimant greater protection from adverse claims than the proposed rulemaking. 47 FR 56303 (Dec. 15, 1982).

4/ According to some sources, BLM's acceptance of the purchase money was improper: "The Department * * * has no right to accept the purchase price for public lands until the purchaser has met all the conditions prescribed by statute and regulation which entitle him to the full legal right to become the purchaser." 2 Rocky Mt. Min. L. Fdn., Am. L. of Mining | 51.10[2] (Second Edition 1988).

1810.3(c). The regulations provide that purchase money may not be tendered where, as here, there are substantial questions as to the validity of the patent application. Thus, no rights are created by the premature payment of purchase money.

[4] The voiding of mining claims for failure to file as required by 43 U.S.C. | 1744 (1982) has the following effect:

> Upon the abandonment of a mining claim, the right of possession of the claimant is absolutely lost, and the claim is to him as though he had never owned or occupied it. The former claimant cannot reclaim the ground or reacquire any interest in the claim by resumption of work or by any act short of making a new location. Rights acquired under a relocation of an abandoned claim, whether by a former claimant or another, will not relate back to the date of location of the original claim, but only to the date of the relocation. [Footnotes omitted.]

Florian L. Glineski, 87 IBLA 266, 268-69 (1985) (quoting from 2 Rocky Mtn. Min. L. Fdn., Am. L. of Mining, | 8.6 (1983)). Thus, owing to the voiding of the claims, Small no longer had any rights to the claims that were the subject of his mineral patent application. Accordingly, BLM properly rejected it. 5/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

David L. Hughes
Administrative Judge

I concur:

John H. Kelly
Administrative Judge

5/ In closing, we note that it appears that a refund of Small's prematurely tendered purchase money is authorized in these circumstances by 43 U.S.C. | 1734(c) (1982).